In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

WILLIAM H. MCALISTER,
Appellant,

AGAINST

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

No. 341.

BRIEF FOR THE UNITED STATES.

This is an appeal from a final order of the Circuit Court of the United States, for the Southern District of New York, made herein on the 14th day of June, 1905, denying the application of the appellant for a writ of *habeas corpus* (fol. 65).

On the 14th day of June, 1905, the Grand Jury of the Circuit Court of the United States, for the Southern District of New York, presented to the Hon. E. HENRY LACOMBE, Circuit Judge, written charges of contempt against the appellant herein for his refusal on that day to answer certain questions and produce certain documentary evidence, material to a certain complaint or charge then under investigation by the said Grand Jury. The presentment set out the service of a subpœna *duces tecum* upon the appellant, requiring him to attend before the Grand Jury,

"in a certain suit or proceeding now pending undetermined in the Circuit Court of the United States, for the Southern District of New York, before the Grand Jury thereof, between the United States of America, as complainant, and The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants, on the part of the United States," and to produce three agreements, specifically described in the said subpœna as follows (fol. 21):

"(1) An Agreement, bearing date September 27th, "1902, between Ogden's, Limited, of the first part; "The American Tobacco Company, of the second part; "Continental Tobacco Company, of the third part; "American Cigar Company, of the fourth part; Con- "solidated Tobacco Compay, of the fifth part; British "Tobacco Company, Limited, of the sixth part; and "The Imperial Tobacco Company (of Great Britain and "Ireland), Limited, of the seventh part; a copy, or a "duplicate original, of the said agreement being on file "or recorded in the companies' registration office, in "London, England.

"(2) An agreement providing for the transfer to a "separate company of the export business from "the United Kingdom (except to the United States) "not only of Ogden's, Limited, but also of The "Imperial Tobacco Company (of Great Britain "and Ireland), Limited, and of Salmon & Gluck- "stein, Limited, and the export business from "the United States of The American Tobacco Com- "pany, the Continental Tobacco Company and the "American Cigar Company (except to the United "Kingdom), which agreement is referred to in the said "last-mentioned agreement of September 27th, 1902, as "having been then already prepared and executed con- "temporaneously therewith.

"(3) An agreement dated September 27th, 1902, "between The Imperial Tobacco Company (of Great "Britain and Ireland), Limited, of the first part; "Ogden's, Limited, of the second part; The American "Tobacco Company, of the third part; Continental

"Tobacco Company, of the fourth part; American "Cigar Company, of the fifth part; Consolidated To- "bacco Company, of the sixth part; and Williamson "Whitehead Fuller and James Inskip, of the seventh "part."

The presentment further set out the appearance of the witness before the Grand Jury and his refusal either to testify or to produce the documentary evidence called for (fols. 13–19). A copy of the minutes of the proceedings of the Grand Jury at the session at which the appellant attended, was attached to the charges (fols. 23–28). It appeared from the presentment that the appellant was the secretary and a director of The American Tobacco Company (fol. 25).

The charges of June 14th were presented by the Grand Jury in open court, in the presence of the witness, who was attended by counsel.

The Court forthwith made the following order (fol. 55):

"The witness is hereby directed to answer the ques- "tions as propounded by the grand jury, and forthwith "to produce, before the grand jury, the papers and "documents called for in the subpœna.

"The grand jury may now withdraw, and the wit- "ness will attend before it forthwith."

The Grand Jury, through the Assistant District Attorney, then resumed the examination of the appellant, who again refused to answer the questions or produce the documents (fols. 55 *et seq.*). Upon these facts being presented to the Court by a further communication from the Grand Jury (fols. 50 *et seq.*), the witness was adjudged by the Court to be in contempt, and was committed to the custody of the Marshal, until he should comply with the order of the Court (fol. 12).

Upon a petition setting forth the above facts, the appellant applied to the Court for a writ of *habeas corpus* (fols. 1 *et seq.*). This application was denied, upon the ground that it appeared from the petition itself that the petitioner was not entitled to the writ (fol. 59). No opinion was rendered by the Court.

All of the above proceedings took place on June 14th, 1905.

At the first session on June 14th the witness, upon being sworn, said :

> " Before being sworn, I respectfully ask to be ad-
> " vised what the ' suit or proceeding ' is, which is thus
> " described in the subpœna under which I have been
> " summoned before this body, the nature or purpose of
> " this ' suit or proceeding,' and the specific charge
> " against the defendants, if any has been made, in order
> " that I may learn whether or not the grand jury has
> " any lawful right or authority to examine me as a wit-
> " ness ; and I also ask that I be furnished with a copy
> " of the complaint, information or proposed bill of in-
> " dictment, if any, upon which the grand jury acted, in
> " order that I may know concerning what transactions,
> " matters, or things I am called upon to testify or pro-
> " duce evidence " (fol. 23).

To this request the Assistant District Attorney responded as follows :

> " Mr. McAlister, this is a suit or proceeding now
> " pending before the grand jury, upon a complaint and
> " charge made, in behalf of the United States of Amer-
> " ica, against The American Tobacco Company and The
> " Imperial Tobacco Company (of Great Britain and Ire-
> " land), Limited, under the so-called ' Sherman act,'
> " being ' An act to protect trade and commerce against
> " unlawful restraints and monopolies.' Under chapter
> " 755 of the Laws of the United States of 1903, ap-
> " proved February 25th, 1903, no person may be prose-
> " cuted, or subjected to any penalty or forfeiture, for or
> " on account of any transaction, matter, or thing, con-
> " cerning which he may testify, or produce evidence,
> " in any proceeding, suit or prosecution under the
> " said ' Sherman act,' under which this suit or pro-
> " ceeding is brought ; provided, however, that no per-
> " son so testifying shall be exempted from prosecu-
> " tion or punishment for perjury committed in so
> " testifying. And I also advise you that it is the pur-
> " pose of the United States Government not to prose-

" cute you, or subject you to any penalty or forfeiture,
" on account of anything that you may testify to, or on
" account of any evidence, documentary or otherwise,
" which you may produce in this proceeding, and that I
" offer you, and assure you, immunity and exemption
" for any such evidence, either documentary or other-
" wise, that you may give " (fol. 24).

Preliminary questions were then propounded to the witness and he declined to answer them, on the following grounds:

" FIRST, that there is no legal warrant or authority
" for my examination; second, that my answers may
" tend to criminate me; and, third, that my answers
" may tend to furnish evidence against The American
" Tobacco Company, of which I am secretary, and which
" is one of the defendants against which this investi-
" gation is directed, and that the Government, in this
" manner, is attempting to compel The American
" Tobacco Company to be a witness against itself in a
" criminal case " (fol. 25).

The witness was then asked whether he had produced the papers called for in the subpœna *duces tecum* and he responded as follows:

" I have not, because, as I am advised by counsel, I
" am under no legal obligation to do so; second, be-
" cause they may tend to criminate me; and, third,
" because they are not my property, but that of The
" American Tobacco Company; and are in my custody
" solely by reason of my official relations toward that
" company. Under these circumstances, my counsel ad-
" vise me that the compulsion of the subpœna would, if
" effective, amount to an unreasonable search for, and
" seizure of, the company's papers and effects, in viola-
" tion of its rights under the constitution, which it is my
" duty to protect by all lawful means, as I am now doing.
" I am further advised by my counsel that the subpœna
" which is, in effect, a warrant to search for, and seize,
" the papers in question, was not issued upon probable

" cause, or supported by oath or affirmation, and is, for " that reason, utterly null and void " (fol. 26).

Questions were asked concerning the relations between The American Tobacco Company and The Imperial Tobacco Company, all of which the witness declined to answer. He was also asked certain questions for the purpose of proving the execution and delivery of one of the agreements described in the subpœna *duces tecum* and he declined to answer. The agreement was exhibited to the witness and thus made a part of the record of the proceedings of the Grand Jury. It is Exhibit C, appearing at folio 29 of the record. A reference to the salient points of this agreement will be sufficient to show its materiality in an investigation of the character foreshadowed in the statement of the Assistant District Attorney.

The agreement is dated September 27th, 1902, and the parties are Ogden's, Limited, an English corporation, The American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, all American corporations, and British Tobacco Company and The Imperial Tobacco Company, British corporations. The agreement recites the control by The American Tobacco Company of the Ogden Company and of the British Company and the proposition to amalgamate those companies with the Imperial Company. An agreement follows for the sale of the property of the Ogden Company, including the control of the British Company, to the Imperial Company, upon certain terms not necessary to refer to here. Suffice it to say that it resulted in the absorption by The Imperial Tobacco Company of all of the interests of the British Companies. The agreement then provides that neither the American Companies, nor the British Companies which are controlled by The American Tobacco Company, shall thereafter engage, either directly or indirectly, except as mentioned below, in the business of a tobacco manufacturer, or in any dealing in tobacco or its products in the United Kingdom of Great Britain. The Imperial Company likewise agrees that it will not engage in the tobacco business or manufacturing in the United States, except with the consent of the American Companies, and except, further, that it shall be at liberty to " buy and treat tobacco leaf, and other materials in the United

"States, for the purpose of its business, and to engage "as subsequently provided in the agreement, in such "business as shall be carried on through or in connection "with" The American Tobacco Company, the Continental Company, the Cigar Company, or the Consolidated Company.

By reference to another agreement which is described as already prepared, special provision is made regarding the export business from the United States of the American Companies, and from the United Kingdom of the English Companies. This was one of the agreements called for in the subpœna *duces tecum*. The American Companies agree (fol. 41) not to "sell or consign any tobacco products to any person, firm or company within the United Kingdom, except the Imperial Company, or any person or companies designated by it." The English Companies similarly agree not to "sell "or consign any tobacco products to any person, firm or "company within the United States, except the American "Company, or persons or companies designated by it." And all the parties further agree that "None of the parties shall "sell any tobacco products to any person, firm or company "whom they have reason to believe will export the same to "the territory in which the seller has agreed not to sell such "goods as herein provided." Provision is also made for the sale by the American Companies to the Imperial Company and by the Imperial Company to the American Company of tobacco at a fixed price, which is stated in the agreement to be based upon cost of manufacture and a commission, and for the manufacture by the American Companies of brands of the Imperial Company and by the Imperial Company of brands of the American Companies.

The American Companies agree to procure the appointment of the Imperial Company as sole agent in the United Kingdom for the sale of Havana and Porto Rico cigars and cigarettes, directly or indirectly controlled by the American Companies, upon the condition that the prices charged by the Imperial Company shall be as low as the prices charged by the American Companies "subject only to the exception that "if, at any time, the prices of cigars or cigarettes sold to any "country not affecting British trade, shall be temporarily re-"duced, *for the purposes of competition*, such local and tem-"porary reduction is not to be taken into account for the

" purpose of fixing the price of cigars and cigarettes sold to " the Imperial Company." The Imperial Company agrees to sell no other cigars than those concerning which the agency is created, and it is agreed that, if the Imperial Company sells 72% of the total annual importations into the United Kingdom, the American Company shall not be entitled " to call in question " the efforts and endeavors of the Imperial Company herein- " before required" (fol. 44). This agreement is stated, however, to be " based upon the belief and assumption that" The American Tobacco Company, the Continental Tobacco Company, the American Cigar Company and the Consolidated Tobacco Company "*control, or will shortly control, not less than " 80% of the aforesaid annual importations.*"

Other provisions of the agreement will become material upon an inquiry whether it is in violation of the Anti-Trust Law, but the foregoing is sufficient to show to the Court that the agreement would have been at least a material and competent item of evidence before the Grand Jury in the present case.

The petition for the writ of *habeas corpus* set out the grounds on which it was claimed that the detention of the petitioner was unlawful (fol. 1 *et seq.*). These grounds are also set out with more elaboration in the assignment of errors. In the main, they are the same grounds that were urged by the appellant in the case of *Hale vs. Henkel*, which is to be argued at the same time as the appeal in this case. Without attempting to repeat them in detail, and for the general information of the Court at this time, we summarize these grounds as follows :

1. That the Court is without jurisdiction to entertain the charge of contempt against the petitioner or to act or proceed in any manner in the premises.

2. That when the petitioner was examined there was no cause or proceeding pending in the Circuit Court between the United States and the corporations named in the subpœna *duces tecum* or between any other parties, in which the petitioner could be required to give evidence.

3. That the legislative, executive and judicial appropriation act approved February 25th, 1903, granting immunity to witnesses testifying in a proceeding, suit or prosecution under the Anti-Trust Law did not apply to the appellant, particularly because the hearing before the Grand Jury was not, within the meaning of the Anti-Trust Law "such proceeding, suit or prosecution," and that, therefore, the appellant was privileged under the Fifth Amendment of the Constitution from giving oral testimony or producing documentary evidence which might tend to incriminate him.

4. That the said Act of February 25th, 1903, is unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in matters constituting violations of the laws of the United States and is, therefore, in violation of Section 2 of Article 2 of the Constitution.

5. That the Act of February 25th, 1903, is unconstitutional and void, because it seeks to set aside the power of the several States to prosecute and punish, and grant and withhold pardons on account of offenses against their laws, thus usurping the power expressly reserved to the several States by the Tenth Amendment to the Constitution.

6. That the Act of February 25th, 1903, referred to above, contains no requirement that a person should testify, but only grants to him indemnity in case he elects to testify.

7. That the compulsory production of the papers mentioned in the subpœna *duces tecum* would be in effect an unreasonable search therefor and seizure thereof in violation of the appellant's rights under the provisions of the Fourth Amendment of the Constitution, and also of the rights of The American Tobacco Company, the owner of such papers and documents, which were in appellant's custody solely as an officer of that Company.

The foregoing objections were all urged in the case of *Hale*. In the case at bar the following additional objections were urged:

8. That the Grand Jury was without authority in prosecuting the so-called "suit or proceeding" described in the

presentment of the Grand Jury, because it could under the Constitution of the United States only investigate "specific "charges against particular persons duly laid before them and "based upon definite allegations," and that the charges originating in the oral statement of the attorney for the Government were not sufficient for that purpose.

9. That the order of the Court directing the petitioner to testify and produce evidence was in effect an effort to compel The American Tobacco Company to be a witness against itself in a criminal case, in violation of the Fifth Amendment of the Constitution, and that the appellant was entitled in behalf of the corporation of which he was an officer, to interpose the privilege under that Amendment.

For answer to all of the foregoing objections, except the ninth, we rely upon our brief heretofore filed in the case of *Hale vs. Henkel.* It seems to be necessary herein to add to that brief only enough to discuss the ninth objection and also to show (1) that if a specific charge against particular persons is necessary to give jurisdiction to a Grand Jury, that requirement has been complied with in this case, and (2) that no objection to the subpœna *duces tecum* served upon the appellant can be made on the ground that it fails to describe specifically the documents called for or that it includes so many as to be burdensome.

FIRST. The protection of the Fourth and Fifth Amendments is based upon the personal privilege of the witness. The objections urged by the witness cannot be relied upon for the benefit of the corporation of which he is an officer.

It has been shown in the *Hale* brief that the Fourth Amendment is inapplicable to the case of the compulsory production of documentary evidence under a subpœna *duces tecum;* or, that if that Amendment could be resorted to at all in such a case it could only be upon the theory that the search or seizure accomplished through the subpœna would incrimi-

nate the witness. The privilege that a witness shall not be compelled to give incriminating evidence is of the same character, whether it arises from the Fourth or from the Fifth Amendment; and, therefore, when we shall have shown that the privilege cannot be asserted in behalf of a corporation under the Fifth Amendment we shall have disposed of a claim that it may be so availed of under the Fourth Amendment.

Where the question of criminality is not involved it is clearly settled that an officer of a corporation having the books of the company in his custody (and the petitioner here admits that he had the papers and documents in his custody, Petition VII., *k*, fol. 7) is bound to produce them in obedience to a subpœna *duces tecum* (*Wertheim vs. Continental R'way & Trust Co.*, 15 Fed. Rep., 718, per WALLACE, J., and note).

And the same rule applies, even though the production of the evidence may tend to incriminate the corporation; one of its officers may not assert in its behalf the privilege secured to *persons* by the Fifth Amendment of the Constitution.

The Fifth Amendment provides that "no person * * * shall be compelled in any criminal case to be a witness against himself;" and the question is whether a "person" as used in connection with this part of the Amendment is intended to include a corporation.

In determining whether the word "person" in a Statute includes a corporation Mr. Justice STORY said that the "mischief intended to be reached" was to be considered (*United States vs. Amedy*, 11 Wheat., 412), and in *Beaston vs. The Farmers' Bank of Delaware*, 12 Pet., 134, it is said that corporations are only to be considered as persons "when the circumstances in which they are placed are identical with those of natural persons, expressly included in such Statutes."

Applying these rules to the above clause of the Fifth Amendment we find no reason either in the mischief which its history shows that it was designed to reach, or in the circumstances under which it is now sought to be availed of which would extend the word "person" used with reference to the immunity of a witness so as to include a corporation.

A. The privilege embodied in the Amendment is upheld on grounds which vary to some extent; but all authorities agree that the privilege is personal and is based upon the consideration of the law for the *individual* in his capacity as a *witness.*

In *Brown vs. Walker*, 161 U. S., 596, this Court said:

> " While the admissions or confessions of the pris-
> " oner, when voluntarily and freely made, have always
> " ranked high in the scale of incriminating evidence, if
> " an accused person be asked to explain his apparent
> " connection with a crime under investigation, the ease
> " with which the questions put to him may assume an
> " inquisitorial character, the temptation to press the
> " witness unduly, to browbeat him if he be timid or
> " reluctant, to push him into a corner, and to entrap
> " him into fatal contradictions, which is so painfully
> " evident in many of the earlier state trials, notably in
> " those of Sir Nicholas Throckmorton, and Udal, the
> " Puritan minister, made the system so odious as to
> " give rise to a demand for its total abolition."

In *Best on Evidence* (9th Ed.), page 113, the author speaks of the privilege as " personal " and says that it is " based on the principle of encouraging all persons to come forward with evidence in courts of justice, by protecting them, as far as possible, from injury or needless annoyance in consequence of so doing."

See, also, *3 Taylor on Evidence*, § 1453.

In *1 Greenleaf on Evidence* (16th Ed.) § 469 *d*, (and cases cited in notes) it is said: " Being intended solely for the witness's sake, the privilege is his own, and not that of the party; counsel, therefore, will not be allowed to make the objection."

See, also,

Commonwealth vs. Shaw, 4 Cush., 594.
Phillipps on Evidence (4th Am. Ed.), p. 935.

In *Starkie on Evidence*, 10th Am. Ed. 4, it is said:

> " Upon a principle of humanity, as well as of policy " every witness is protected from answering questions " by doing which he would criminate himself. Of policy, " because it would place the witness under the strongest " temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of " truth by a kind of duress, every species and degree of " which the law abhors."

In *Wigmore on Evidence*, § 2263 (page 3123), it is said:

> " Such, too, is the inference from the policy of the " privilege as a defensible institution (*ante*, § 2251); that " is to say, it exists mainly in order to stimulate the " prosecution, to a full and fair search for evidence pro- " curable by their own exertions, and to deter them from " a lazy and pernicious reliance upon the accused's con- " fessions."

Mr. Wigmore has shown in a very learned review of the historical origin of the privilege that in England both in the ecclesiastical and common law courts it arose from considerations based solely upon the situation of the individual in his capacity as a witness (§ 2250).

In *State vs. Wentworth*, 65 Maine, 234, 241, Chief Justice APPLETON said that it is the " privilege of the witness alone. * * * The interests of justice would be little promoted by its enlargement." A party to the action having objected, the Court held that only the witness could object, and added: " The privilege, it must be borne in mind, is purely personal."

JESSEL, M. R., in *Reynolds vs. Reynolds* (1882), 15 Cox. Cr., 108, 115, said:

> " Perhaps our law has gone even too far in that " direction; and, without impugning the policy of the " law, there certainly must be a larger policy, which re- " quires a person to answer, where the judge thinks that " he is not *bona fide* objecting with the view of claiming " the privilege to protect himself, but to prevent other " parties getting that testimony which is necessary for " the purposes of justice."

In *Bartlett vs. Lewis*, 12 C. B. (N. S.) 249, 265, it is said that the privilege is to protect an innocent witness from the danger of a wrongful conviction.

These authorities, it will be seen, give various reasons for the existence of the rule. But, whether the basis for the privilege be that a witness should not be placed at the disadvantage of being led, through confusion, or ignorance, or anxiety, to make ambiguous or suspicious statements; or whether the rule was adopted to avoid the demoralizing effect on the administration of justice of a possible resort to brow-beating and abuse, and finally to some form of torture; or whether it was designed to avoid perjury on the part of the most interested party; or, finally, whether the privilege is extended to encourage persons to come forward and testify—in any case it is quite clear that the privilege is purely *personal* and is based upon the consideration of the law for the witness as an *individual*.

B. Every consideration that arises from conditions of modern civilization requires that the rule should not be extended further than is necessary to accomplish its original purpose of caring for the personal rights of individuals. This was the view of Judge APPLETON and of JESSEL, M. R., in the cases referred to above. And Mr. Wigmore comments upon the danger of extending the rule as follows (p. 3101):

> "In preserving the privilege, however, we must re-
> "solve not to give it more than its due significance. We
> "are to respect it rationally for its merits, not worship it
> "blindly as a fetish. * * * Indirectly and ultimately it
> "works for good,—for the good of the innocent accused
> "and of the community at large. But directly and con-
> "cretely it works for ill,—for the protection of the guilty
> "and the consequent derangement of civic order. * * *
> "(p. 3102). The privilege therefore should be kept
> "within limits the strictest possible. A multiplicity of
> "statutes have shown how seriously it is felt to block the
> "investigation and punishment of crime. Courts should
> "unite to keep the privilege strictly within the limits
> "dictated by historic fact, cool reasoning, and sound
> "policy."

Again he says, (page 3107):

> "To invoke the sentiments of lofty indignation and of "courageous self-respect against the arbitrary methods "of royal tyrants and religious bigots, holding an inquis- "ition to enforce cruel decrees of the prerogative, and "torturing their victims with rack and stake, is fitting and "laudable, and moves men with a just sympathy. But to "apply the same terms to the orderly, everyday processes "of the witness-stand, in a community governing itself "in freedom by the will of the majority and having on "its statute-book no law which was not put there by it- "self and cannot be repealed to-morrow,—a community, "moreover, cursed above others, by constant evasion of "the law and by over-laxity of criminal procedure,—this "is to maltreat language, to enervate virile ideas, to "abuse true sentiment, to degrade the Constitution, and "to make hopeless the correct adjustment of the best "motives of human nature to the facts of life."

Judge Thompson, in 5 Cr. L. Mag., 182, after pointing out that the "maxim originally meant that no one should be compelled, *by torture*, to criminate himself," says: "But such a maxim has no place in an enlightened and humane system of jurisprudence. We have outgrown it."

The privilege has become deeply fixed in our system of jurisprudence. It will never be abolished. But it is equally certain that the progress of Anglo-Saxon civilization and the enlightened administration of justice in our courts have made it less and less necessary for the protection of the rights of persons; and every consideration of a proper protection of the body politic demands that the privilege should not be extended beyond the limits which are to be fixed by reference to its historical origin; and this, as we have already shown, would confine the beneficent protection of the privilege to witnesses in their personal and not their representative capacity.

C. While sporadic cases look in a different direction, there have been a number of well-considered decisions, both in this

country and in England, in which the Courts have refused to permit the privilege to be asserted by an officer or employee in behalf of a corporation of which he is the representative.

In *New York Life Ins. Co. vs. People*, 195 Ill., 430, the agent of an insurance company was permitted to testify in a suit for the recovery of a statutory penalty, to facts showing the performance by the corporation of the act prohibited by the statute. The Court held that this was not error, saying (p. 432):

> "If the privilege invoked be applicable to such case, "it is a personal one, and inasmuch as the witness did "not himself claim the privilege, the company cannot "do so, and it is the only appellant here."

In *Wigmore on Evidence*, § 2259 (page 3115), it is said:

> "It is obvious that the criminal act of a *third person* "cannot be the subject of privilege for the claimant. "It is also plain, on the other hand, that a *corporation*, "when discovery is sought from it as such, is to be "equally protected from disclosure, so far as it is capable "of committing a criminal act. What is the effect of "these two premises upon the questions that arise when "discovery is sought from an *officer* or *employee* of a cor- "poration—in the usual case, by a demand for the pro- "duction of the corporate books?
>
> "In the first place, the employee or officer cannot "refuse to produce on the ground that the disclosure "would affect the corporation. On the other hand, where "the corporate misconduct involves also the claimant's "misconduct, or where the document is in reality the "personal act of the claimant, though nominally that of "the corporation, its disclosures are virtually his own, "and to that extent his privilege protects him from pro- "ducing them."

In re Moser, 101 N. W. Reporter, 591, the Court, speaking of the privilege, said:

"It gives him (the witness) no right to attempt to "avert real danger from others, no matter how closely "he may be associated with them. Unless the answer "to the question may tend to criminate himself, he must "answer whatever the consequence may be to others; "otherwise the administration of justice would be "seriously obstructed."

In the case of *In re Peasley*, 44 Fed. Rep., 271, the petitioner had been summoned before the Grand Jury to give evidence relative to a proceeding under the Interstate Commerce Act on account of alleged violation by one Millett, general agent of the C. B. & Q. Railroad. The subpœna *duces tecum* had been served upon him ordering him to bring certain documents. This he refused to do. Judge GRESHAM, in the Circuit Court, Northern District of Illinois, held that the District Court properly adjudged Peasley in contempt. The petitioner averred that the Fourth and Fifth Amendments justified his attitude before the Grand Jury. The Court said, on page 275:

"If a witness cannot claim the privilege for the "benefit of himself he cannot claim it for the benefit of "another * * *."

In *U. S. Express Company, Iowa Railroad Company and A. W. Frazier vs. Henderson, Judge*, 69 Iowa, 40, Frazier had been ordered by a subpœna of the Grand Jury to produce before it certain books of the Express Company and the Iowa Central Railroad Company. He refused to produce the books because they would incriminate his employers who were corporations. The Court adjudged Frazier guilty of contempt, and he filed a writ of *certiorari* to the Supreme Court.

The Court said, on page 41, by ADAMS, Ch. J.:

"We think that the Court was right in adjudging "Frazier to be in contempt. The only question raised "is as to whether it was the privilege of the witness to "refuse to produce the books under the section of the "Code above cited.

* * * * * * *

"If it had been claimed that the books called for "tended to render the *witness* criminally liable, it may

" be that he could not properly be required to produce
" them. But the claim is simply that they tended to
" render the witness' *employers* criminally liable. The
" case, it seems to us, is not different from any other
" where a witness is asked to produce a book or paper
" of his employer. If the book or paper is not within
" his control, that, of course, would be sufficient reason
" for not producing it. But the refusal in this case is
" not based upon that ground. It is based upon the
" identity of the witness with his employers. But the
" fact the employers had taken on a corporate character
" did not identify with themselves an employee to any
" greater extent than any employee is identified with his
" employer."

Gibbons vs. The Company of Proprietors of the Waterloo Bridge and William Bayley, their chief clerk, 5 Price, 491 (decided in 1818) was a bill filed by the plaintiff praying a discovery. The defendants demurred to the bill, showing that it appeared by the bill that if the defendants were guilty of certain irregularities they would be obliged to pay a penalty and forfeiture. The defendants' clerk was not one who would have been liable to pay a forfeiture, but he demurred to the bill on the ground that his answer could not be read in evidence against the other defendants, that is, he could not incriminate them. The Court dismissed the demurrer on the ground that he had no right to demur on the ground that he would incriminate others and the demurrer was bad for joining him. The Court said, on page 493:

" I never knew an instance of a clerk demurring to
" a bill of this sort. * * * I have no difficulty in
" saying that the demurrer cannot be maintained, for it
" is clear that the clerk and the defendants cannot de-
" mur on the ground that his principals are liable to
" penalties and his answer could not be read against
" them."

(NOTE. In this case the principal mentioned was a corporation.)

Rex vs. Purnell, Wilson, 239, and *Rex vs. Cornelius*, referred to in the *Gibbons* case, were cited by counsel below against the principle established by the cases we have just cited. But they have no such tendency. For in both of those cases it will be found, upon an analysis of the opinions, that the corporate misconduct sought to be proven by the witness also involved the misconduct of the witnesses themselves. In the *Cornelius* case the document which it was sought to obtain was in reality the personal act of the witness, though nominally that of the corporation ; and the effort in both cases was to seek to elicit testimony from the witness which would have criminated him. The *Queen vs. Granatelli*, 7 State Trials (N. S.), 986, was a similar case.

D. An officer asserting the privilege against incrimination in behalf of a corporation, in fact asserts it for the benefit of other persons ; and this the law will not permit (*Wigmore on Evidence*, § 2259 ; *Elliott on Evidence*, § 1007, and cases cited in notes). It is claimed, however, that an officer is identified with the corporation, and that, therefore his assertion of the privilege is in effect the act of the corporation. In relation to some kinds of acts, this is undoubtedly true ; for a corporation can only act through its officers. But there is no sound reason for resorting to this principle where a corporation has been guilty of a violation of the criminal law and is seeking to avoid the consequences A corporation can suffer no criminal penalty or forfeiture except by loss of property. If it pays a fine or a penalty, its assets are reduced. But in any loss of property thus caused, the stockholders or members of the corporation are the ones who really suffer. Therefore, if an officer of a corporation is permitted to assert the privilege under the Fifth Amendment in behalf of the corporation, he is really asserting it not in behalf of that artificial body, but rather for the benefit of the individual stockholders.

In the case of a co-partnership there is a legal entity independent of the individual partners. Each partner may represent the firm, and while a co-partnership may not, like a corporation, be subjected to a criminal penalty or forfeiture, yet if as a co-partnership it has been guilty of wrong doing, and has suffered a penalty or forfeiture, the loss will ultimately

fall upon its members exactly as it would in the case of a corporation. Notwithstanding this, any partner can be compelled to produce incriminating evidence against his copartners. But if these same individuals should adopt a corporate organization, they could, upon the theory now advanced, use the privilege of the Fifth Amendment to escape the penalty of their unlawful acts merely because they had interposed between themselves and one of their number called as a witness, an artificial form of organization. If the framers of the Constitution had intended to bring about such a result surely they would have used language more appropriate for the purpose.

It was long ago held (*Banks vs. Deveaux*, 5 Cranch, 61), that, in order to sustain the jurisdiction of a Federal Court on the ground of diverse citizenship, the Court would look behind the artificial form of a corporation and "contemplate it more substantially" by ascertaining the citizenship of its members. And in the *Northern Securities* case this Court refused to permit the consequences of a violation of the Interstate Commerce Law to be avoided by the organization of the New Jersey corporation, rejected the technical argument that the corporation had the legal power and authority, under the law of New Jersey, to do what it was attempting to do, and dealt with the corporation as a mere instrumentality for carrying out a combination, which was in violation of Federal law. There is no more reason here why the Court should extend the significance of the language of the Fifth Amendment beyond the scope and purpose of the privilege which it was designed to perpetuate by adopting a construction which would enable a number of individuals, merely by assuming a corporate form, to surround their illegal transactions with secrecy which they could not otherwise secure.

In *Bank of Augusta vs. Earle*, 13 Peters, 586, it was claimed that where the members of a corporation were citizens of one State, the corporation could go into another State and there enjoy the "privileges and immunities" which the members would have enjoyed if they had not associated themselves in corporate form, and that, to sustain such a constitutional right, the Court should look behind the artificial form and protect the members of the corporation as "citizens" and the real parties in interest. But the Court said that that would

be giving to individuals an advantage *without subjecting them to the liabilities which, by adopting the corporate form, they escaped*, and that they would thus enjoy "far higher and greater privileges" than were enjoyed by the citizens of the State itself (see, also, *Paul vs. Virginia*, 8 Wallace, 168; *Pembina Consolidated Mining Co. vs. Pennsylvania*, 125 U. S., 181). There is an analogy in the case at bar to the situation in the *Earle* case; for here individuals, by resorting to a corporate form, are claiming an immunity from a disclosure by their officers of the business affairs of the members which the latter would not have enjoyed in their individual capacity, and which neither a copartnership nor an unincorporated association nor an individual would be permitted to enjoy. And if the claim be conceded, the representatives of a great corporation most familiar with its affairs could check the investigation of any illegal transaction by which it might seek to oppress and destroy copartnerships and individual merchants who enjoy no vicarious advantage under the Fifth Amendment. The Court should "contemplate" that situation "substantially" enough to look behind the corporate form and discover that the members of the artificial entity are the persons who are really benefited by the assertion of the sacred privilege against self-incrimination, and that they are enjoying "far higher and greater privileges" than are enjoyed by those who have not resorted to such an organization.

SECOND. The complaint or charge against The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, made in behalf of the United States by the Assistant District Attorney, was sufficient to justify the Grand Jury in investigating it by taking evidence.

We think that this point is sufficiently covered by what has been said in the First Point, II. (p. 33), of the Brief in behalf of the United States in the case of *Hale vs. Henkel*, where we pointed out that it is not necessary that there

should be a specific charge against a particular person in order to give the Grand Jury power to proceed. But if it should be considered that our contention in that case was too broad, the additional particulars in the charge or complaint made herein have avoided all possible objection.

The charge or complaint was " duly made and presented " to the grand jury by an officer of the Government in attendance before it. It was made before the subpœna *duces tecum* was served. It charged the defendants with violations of the Anti-Trust Law (1) in making on about September 27th, 1902, an agreement in restraint of trade between the several States, and also between this country and foreign countries ; (2) in carrying out since said September 27, 1902, the terms of said agreement ; (3) in attempting on or about said September 27th, 1902, and continuously ever since, to monopolize trade and commerce among the several States ; and (4) in combining and conspiring on or about September 27th, 1902, and ever since, to monopolize the trade and commerce among the several States, and in carrying out such combination and conspiracy (pages 7 and 8).

Here is a charge defining the character of the offense and the date of its commission. It did not have the technical accuracy of an indictment ; but it was sufficient (1) to enable the Grand Jury and, on objection, the Court, to determine whether any evidence called for was material and competent, and (2) to enable the witness to exercise his constitutional rights ; and, as we have shown in the *Hale* brief, if any charge is necessary, all reasonable requirements have been complied with when the charge is specific enough for these purposes.

It is immaterial that the charge was oral—indeed it does not appear that it was not in writing. If it appears on the records of the Grand Jury, that is sufficient; for it is not to be filed for any purpose and can have no use except to guide the Grand Jury in the investigation. No answer can be made. If an indictment follows the complaint becomes unimportant.

The charge was " duly " made. There has never been any technical practice (except in the case of a private prosecutor who submitted an engrossed indictment) as to the form of a complaint. Being presented by the public prosecutor verification could not be necessary. He could not be sued for ma-

licious prosecution or be made chargeable with costs; and thus the two principal reasons for the technical requirements where a private prosecutor presented a bill of indictment, are absent.

Finally, the Court in directing the witness to produce the evidence, adopted and approved the charges as its own and it was as if it had originally committed them "in charge."

The charge or complaint was clearly sufficient.

THIRD. The subpœna duces tecum was framed in compliance with all technical requirements of the law.

The documents to be produced were described in the subpœna *duces tecum* by reference to date and parties. The witness stated that the papers called for were in his custody (fol. 26). It cannot therefore be urged as it was in the *Hale* case that there is any lack of definiteness in the description of the papers. And as only three agreements are called for there is no ground for claiming that an undue search is to be made among the papers of the American Tobacco Company.

That the compulsion of the subpœna does not amount to an unreasonable search or seizure under the Fourth Amendment has been sufficiently shown in the Second Point in our Brief in the *Hale* case.

FOURTH. The order of June 14th, 1905, should be affirmed.

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